Annual Meeting 2002 Monterey

BLS Cyberspace Law Committee Presents:

The Future of Entertainment in Cyberspace

State Bar of California Business Law Section Cyberspace Law Committee

Copyright in the Digital Age

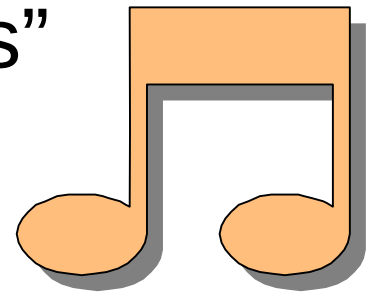
By: Beverly Robin Green,
Green & Green
Marin County & San Francisco

Copyright Survives Technology/Napster

- **U.S. Copyright Law, 17 U.S.C. § 101 et seq., evolved over half a Millennium:**
  - **From English common law over 500 yrs. ago, w/the advent of first threats of technology-the then hi tech Gutenberg Press & the English Statute of Anne, to protect writings, 300 yrs. ago, to a Constitutional Right**
  - Article 1, § 1 of the U.S. Constitution
    - Granted Congress the power to promote copyright in the "useful arts" by protecting for "**limited times**" the rights of "authors" in their "writings"…[also patent law]
    - Always balancing act of rights: 1st Amendment freedom of speech arguments, "Fair Use" defense factors & the protection of the public from monopolies-antitrust defense issue raised in Napster case…

Recorded Music Not Protected

- 1st US Act-limited to "writings"
  - White Smith v. Apollo
    28 S.Ct. 319 U.S. (1908)



- S.Ct. construed "writings" narrowly; Held "Mechanically" made and readable copies of music on then hi-tech piano rolls were not "writings" as was sheet music, and not entitled to © protection!
- Could have been death to fledgling US music publishing industry, but Congress came to rescue…

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1909 Copyright Act

- **Congress addressed this new technology in the 1909 Act & corrected this negative effect by:**
  - Extending language of © protection to so-called “Mechanical” copies,
    - **Creating so-called “Mechanical Rights” and the “Mechanical Royalties” that are such an important source of income to the music publishing industry today**

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Copyright Act of 1976
A "Bundle" of Rights

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Major © Law Revisions, eff. 1.1.78, still the Basic "New" © Law; recent Laws amend this Law

Copy "RIGHTS" include EXCLUSIVE rights to:

- 1) so-called "Reproduction Right"- Basic "copy right" to "Copy", reproduce or make copies or phonorecords of a copyrighted work
- 2) "Derivative Rights" – Broad rights to prepare derivative works based on the copyrighted work,
- 3) "Distribution Rights" – To distribute, by sale, rental, lease, or lending, a copyrighted work,
- 4) "Performance Rights" To publicly perform a copyrighted work (with great differences between the earlier & broader protection granted to musical works and the much more recent and limited protection granted to sound recordings), and
- 5) Rights to publicly display a copyrighted work.

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Duality of Music Rights

- **© Law Separate Categories of Copyrightable "Works" including the *Music* as a separate Copyrightable Work from *Sound Recordings***
- **So called "Performance right" only applied to underlying Musical work (PA), & Not separate SR of music**
  - **The © owner of the Music is called the Music "Publisher"; while the © owner of the SR is usually the Record Co.**
- **Federal copyright protection for SR only since amendment effective *to SR fixed since Feb.15, 1972***

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Latest Copyright Laws
Digital SR Perf. Rt.

- Digital Performance Right in Sound Recordings Act of 1995 (DPRA) P.L. 104-39; S.227
  - **Expanded SR rights to Limited "Performance Right", ONLY for certain DIGITAL PERFORMANCES, with**
  - **Exceptions for Digital "Broadcasts" (similar to Radio BC) & Statutory License/Rates for certain Subscription Services not interactive or on-demand (digital only=NOT fully RECIPROCAL for $$$ payments under EU treaties).**

Digital Millennium Copyright Act 1998
(DMCA)17 U.S.C. §512 et seq.

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- To Implement WIPO (World Intellectual Property Organization) Treaties for RECIPROCITY of © protection and
- To address other technology related © Issues, Incl.
  - Prohibit circumvention of technology measures to protect © (also Film Industry CSS issue)
  - Provide Online © Infringement Liability Limitations for online service providers under CERTAIN categories & conditions, and
  - To extend the Digital Performance Rights Act to incl. so-called "streaming audio" & "webcasting"
    - © Office Arbitration Panel rates – after hearings, came back higher than 3%-15% gross; Webcasters claimed $.007-$.014 per song (70 cents per performance per thousand listeners) would drive them out of business, anti-trust; asked Congress to intervene…Oct. 7 House passed "Small Webcasters Amendment" -under $1mil pay $500-$5,000/5-7%Gr.; Non-Profits pay 20 cents per thousand
  - Savings Clauses: Digital Millennium Act does Not effect "Fair Use" or Vicarious or Contributory Infr.

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First Sale Doctrine

- **Copyright Law recognizes the distinction between ownership of a physical property and ownership of the © in the property**
- **The Common Law so-called "First Sale Doctrine" allows the owner of a particular work to dispose of that copy-based on the CL principle that restraints on alienation of property are to be avoided**
- **But does NOT give you a right to do whatever you want with a copy**
- **The First Sale Doctrine is a primarily a limitation on the copyright owner's exclusive distribution right, not the reproduction right. §109"(a)…the owner of a particular copy of phonorecord lawfully made…is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."…[But, under the "Record Rental Amendment"]**
- **"(b)(1) (A) NOTWITHSTANDING…UNLESS AUTHORIZED BY THE OWNERS OF COPYRIGHT in the sound recording or...COMPUTER PROGRAM…and in the case of a SOUND RECORDING in the MUSICAL WORKS embodied therein, neither the owner of particular phonorecord nor…computer program… may [NOT], for the purposes of direct or indirect commercial advantage, DISPOSE OF THE POSSESSION PHONORECORD OR COMPUTER PROGRAM (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or BY ANY OTHER ACT OR PRACTICE IN THE NATURE OF RENTAL, LEASE, OR LENDING."**

The Same for Digital Copies?

- **In the Executive Summary of the Digital Millennium Copyright Act of 1998, the CO found that**

  "There is no dispute that §109 applies to works in digital form", and that physical copies in a digital format, such as CDs or DVDs, are subject to the law in the same way as physical copies in analog form
- **The CO recommended no change in §109 of the law**
- **Some would argue that digital media (e-books, DVDs) must be able to be unlocked to be playable on all computers BUT the law is valid, says the CO, But even in the "old days" piano rolls were not all playable on all pianos and a CD cannot be played on a record player, an 8mm on a VCR; it is NOT NEW that copyrightable works are not accessible by all players.**
- **Rec. Co's face consumer pressure to "unlock" CDs (Balancing of the Legal & the Business Aspects)**

"Sony Bono Copyright Extension Act"
Adds 20 yrs.

- 1998 Act Incr.1976 Act Term by 20 years to Life + 70 years (conforms to EU treaties/reciprocity)
- Latest of several (11) extensions of the term, since Congress was granted the Const. power to protect © for "**limited times**"; from 14 yrs. to 28, to renew to 56, to 75, to life + 50 (95 for corps-WMFH).
- Still "limited time" & © materials can still be used under certain circumstances & conditions
- 1st A. Const. Chall. –never before challenged, rejected by US Court of Appls. D.C. Cir.; BUT S.Ct. granted CERT. in *Eldred v. Ashcroft* 01-618 [Feb, 02] S.Ct. Hearing this last week-Wed., Oct. 9, 2002
- Push by Internet "Library" host of "free" PD materials & Stanford U Law Prof. could cost movie studios & heirs of authors/composers Million$$, But Disney's "Mickey Mouse" would still be protected by later versions, and Trademark Law

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Work Made for Hire

- **WMFH defined in the current law 17 U.S.C. § 101**
  - **"Work for Hire" applies only under 2 circumstances, only if:**
    - **Artists are *Employees* of the Record Companies (applying traditional common law tests of employment) or**
    - **If Independent contractors, if work specially ordered or commissioned, AND by written contract, only for certain categories, BUT SR are not inthe WMFH categories**
  - **One Major Defense Issue raised in "Napster" was whether the Record Cos. could rightfully claim SRs as "work made for hire" or whether the recording artists have claim to their work:**
    - **The RIAA lobbied for & got, in 1999, a so-called "technical correction" amendment to include SRs as a WMFH category, but when caught, it was repealed retroactively in 2000, w/a specific provision "that neither the amendment nor its deletion can be given any legal significance."**
    - **A new Artists lobbying group, the "Recording Artists Coalition" (RAC) filed a brief in Napster against the RIAA on these issues = HELD: The Record Companies must prove OWNERSHIP** (Best Practice = WMFH + ASSIGNMENT)

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The Record Companies -Who are they anyway…

- **The major recording industry trade group, the RIAA- the "Recording Industry Association of America" repr. mostly the so-called "Big 5" Major Int'l Labels:**
  1) German based Bertelsmann Music Group BMG- over 200 labels incl.Arista, RCA Records;
  2) France Vivendi UniversalMusicGroup-A&M, IslandDefJam,Geffen,MCA,Motown,Polydor,Verve…;
  3)Japan'sSonyMusicEnt.-Columbia,Epic,Sony…;
  4)UK based EMI Recorded Music- Capitol,Angel,Chrysallis Priority,Virgin;
  5)AOL Time Warner's Warner Music Group- Atlantic,Electra,WarnerBros.Records…;
- **ALL MAJOR INT'L CORPORATIONS;**

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Record Contract Issues

- **Besides WMFH/Ownership issues, Other Artist v. Rec. Co. Issues incl.**
- **so-called "7-year rule" – anti-slavery provisions of California Labor code §2855-Personal Services Contracts**
  - Subdiv. (a) Limits employment contract to 7 years, BUT Record Companies lobbied exceptions for Recording Commitment Obligations to continue as enforceable under Recording k's; (up to 10 "options", 20 yrs=Unfair to Artists)

No Love Lost – or "Smells like Money"

- Love v. Universal: Courtney Love, widow of Nirvana's Kurt Cobain ("Smell's Like Teen Spirit") sued Universal over the 7-year rule stretch and other overreaching Rec. Industry "standard" contracts; vowed to fight it to the end to change industry practices; on Oct. 2, an LA Court ruled she could proceed to trial on most counts; next day, she settled; settlement incl. rights to Universal to release Nirvana's "You Know You're Right" – get it now on KaZaa!
- Dixie Chicks- similar suit ag. Sony Music settled in June.
- In Jan., another LA Court ordered Universal to pay $4.75 million to a group of 300+ artists, in a class action suit lead by Peggy Lee, for royalties they were cheated out of by Universal's Decca Records, since the 1940's.
- = No suits pending to resolve these issues…

Back to the Legislature

- Suits ag. Giant Int'l Co's take too much time & $
- With no suits pending, Recording Artists Rights Groups are back to the Legislature, Lobbying for 1) changes to the CA Labor Law to enforce the CA 7-yr. limit on record contracts and 2) new laws to hold Rec. Cos. Accountable for payment of royalties – testimony from Bing Crosby's widow, to the Eagles Don Henley, to the Backstreet Boys, that rec. co's. "standard" accounting/audit provisions and practices cheat artists out of millions of dollars of royalties…

What the Now "Ded Kitty" Case Still Stands For (or "And the Law Won")

- Napster A & M Records, Inc. vs. Napster, Inc.
  U.S.D.C. N Dist California, No. C 99-5183 MHP No. C 00-0074 MHP was the **1st court challenge by the majors-RIAA-major record cos. & music publishers against the rampant "free" Internet use of music**
- The Napster case tested how the cobbled together Copyright Law applied to new challenges of technology & the internet & "The Law Won"
- **Napster had 40-60 million "free" users downloading music**
  - **Not the 1st time there was "free" music, traditional Radio was "free", too, BUT technology was such that radio was promotional; limited, & not interactive, on demand, or downloadable; not so easily or perfectly copied; or on massive scale; promoted music sales**
- Traditional "Fair Use" factors were held to be considered as an affirmative defense (even though they did Not apply to Napster's use)
- Also, Napster was lobbying Congress for some kind of "compulsory" licensing on record companies for digital downloads, something like the compulsory licensing provisions of the Copyright Law (17 U.S.C. §115) that apply to mechanical licensing of **musical compositions**, to digital downloads of **sound recordings**
- **As confirmed in Napster, © infringement still requires:**
  - **1) proof of ownership of copyright &**
  - **2) infringement of one or more exclusive bundle of rights in ©**

Napster Was Not Like Pre-Internet Technology-Internet is Not Betamax

- **Napster argued its service was capable of non-infringing, personal use of "time-shifting", as allowed by the S.Ct. Sony v. Universal 104 S.Ct. 774, 464 U. S. 417 (1984).**
  - Under Sony, or the "Betamax" case, the copyright holder cannot extend his monopoly to products "capable of substantial noninfringing uses."
  - But US No. Dist. Court Chief Judge Patel rejected the comparison & granted prelim. inj. ag. Napster noting:
    - **Napster's control over the service (as opposed to a mere manufacturer) &**
    - **The "VAST SCALE" and "MASSIVE SCALE" of "illegal copying"and distribution by "millions of users" swapping unauthorized files they don't own**
    - **The Post-Napster Infringers have even more USERS!**

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Napster Not like MP3 Player

- **Napster's argument as to stretching "time-shifting" to "space-shifting" as allowed for MP3 Players, also rejected**
  - **RIAA v. Diamond Multimedia Sys., Inc. 1999 9th Cir. (U.S.C.A. .9th Cir. 1999) 180 F.3d 1072, involved an inapplicable statute (Audio Home Recording Act of 1992)**
  - **MP3 Player case allowed space-shifting as a non-commercial personal use**
  - **Note: the MP3.com WEBSITE was earlier held to be infringing, just like Napster, and their counsel (CooleyGodward) were sued for Malpractice! (Best Practice=Don't just tell clients what they want to hear!)**

Napster Not Fair Use:
9th Cir. Reviews Fair Use Factors

- The U S Court of Appeals for the Ninth Circuit upheld Judge Patel's preliminary injunction ruling, and her fair use analysis:
-
  - **"FAIR USE" affirmative defense factors listed in 17 U.S.C. § 107; they are factors only; used to guide the court's fair use determination**

- **These 4 FAIR USE factors are:**

  - **(1) the PURPOSE AND CHARACTER OF THE USE;**
    - **Downloading MP3 files is not transformative (not a parody as in Campbell v. Acuff-Rose Music (1994)).**
    - **Napster file hosting service is a commercial, large scale, anonymous use; not a non-commercial, personal use**

  - **(2) the NATURE OF THE COPYRIGHTED WORK;**
    - **Note: Music and SR are entitled to more protection than "fact-based" works, as closer to the core of intended © protection**

[1] 510 U.S. 569 (1994)

Napster Not Fair Use

- **(3) the "AMOUNT AND SUBSTANTIALITY of the portion used" IN RELATION to the work as a whole; and**
  - **Note that file transfers necessarily involve copying the entirety of the work (while entire copying WAS allowed as time-shifting in the Sony Betamax video player case)**

- **(4) the EFFECT OF THE USE UPON THE POTENTIAL MARKET for the work OR the VALUE of the work.**
  - **"The importance of this [fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors." Campbell, 591 n.21."**
  - **Rec. Cos. Argued undercutting own efforts to start digital music services; leading to new Anti-trust allegations**

CONCLUSION: Between the massive, commercial use (Factor 1), the most protected status of the creative works to be protected (Factor 2), the entirety of the copying (Factor 3) and the alleged effect on the market (Factor 4) , the factors weight against "Fair Use" for Napster.

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Napster Changed its Tune TOO LATE!

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File Edit View Favorites Tools Help

Back Forward Stop Refresh Home Search Favorites History Mail Print Edit Discuss

Address C:\WINDOWS\TEMP\PKG63A3.MHT Go Links

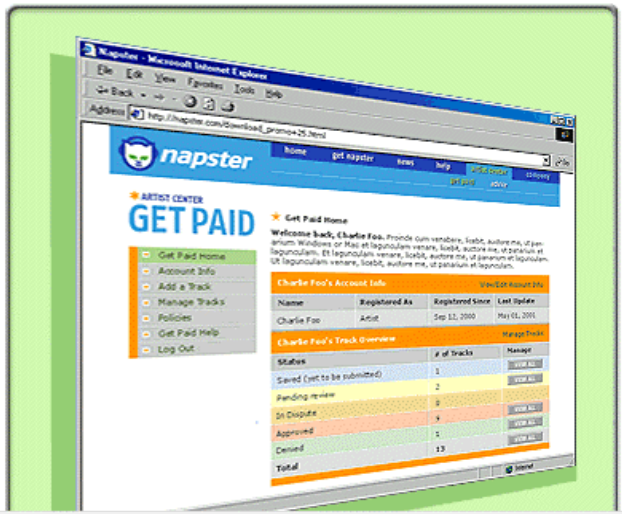
napster

Home
Download
Press Room
Help

Service Status
Company
Policies

Napster Preview

Artists Get Paid
Napster will offer artists and labels tools to register as rights holders and get paid for sharing their music on Napster. Artists and other rights holders can set rules for how their music files are used, check their account status online, and receive quarterly statements.



Since 9th Cir. Affrd. Napster tried to negotiate licenses/ start paid service

"Artists Get Paid"

What Price point to lure back 60 million?

Bankruptcy Court rejected BMG offer- Porn site, Private, offered few mil for name recognition?

My Computer

File Edit View Favorites Tools Help

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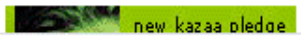

Your Privacy

cnet DOWNLOAD.COM Download now!

When Napster died, others rushed in to take its place **KaZaA, Morpheus,** Millions more users than Napster, over 130 million downloads of software (do the math x 100's= billion$) ("free" "spyware", too!)

Great potential market in "singles" and "downloads"

Direct P2P music swapping Kazaa Held by Dutch Court to NOT be Contributory © Infr. under Dutch law; BUT still infr. and Rec. Co's. still after Sharman Networks now based in Australia and Europe, under US © Law.

Done Internet

Music Subscriptions?

- **Record Cos. own Digital Subscription Services-Complexities of Licensing:**
- **PressPlay joint venture of Sony and Universal Music, but NO Beatles or Beach Boys under "B", for instance, and MusicNet joint venture of Warner, BMG and EMI boasts 75,000 songs from thousands of artists, while independent Listen.com claims 15,000 albums from 6,000 artists licensed from all the Big 5, none are very complete and all are complex and costly to users used to it all for free.**
- **All are losing $$$, won't disclose how many subscribers**
  - **Public is generally rejecting the idea of limited materials, & any *paid*, subscription online music services, and**
    - **Still expecting everything on the net to be for "free"**
    - **Labels lobbying for laws to go after infringers, resorting to "spoofing", better access, quality, extras, may be "draws" (BonJovi release injunction just denied ag. Universal by DownloadCard PIN code developer, case to continue…)**

- **Societal change, Education needed: Ad campaign w/BritneySpears, Eminem, StevieWonder,Madonna, EltonJohn, Vanessa Carlton- print ads running now; TV spots on the way-The Message:**
- **"Stealing Our Music OnLine is as Bad as Stealing a CD from a Store" (Don't rip off the artists you love)**

Foretelling Changes in the Entertainment Industry:

- **E-Book Publishing Cases demonstrate that the courts are developing a consistent policy of protecting copyrights from the printed page to the digital compact disk or onto the internet.**
  - **National Geographic - ownership of the photographs and the scope of the license, and narrow application of the privilege (*not the right*) of 17 U.S.C. §201 (c)= NG on compact disc was not a mere "revision" of a collective work, but a new, derivative work, one of the exclusive bundle of rights of the © owner (17 U.S.C. § 106(2)).**
  - **Tasini US Supreme Court also ruled that re-publication of copyrighted works of freelance writers in an electronic *database*, when the articles were only licensed for use in print, also constituted copyright infringement, by creating a new work, (instead of just a revision of an existing collective work).**
  - **Random House v. Rosetta Books Rosetta contracted with authors to sell e-versions of books; Random House tried to enjoin, claiming contractual rights to publish all books, including digital books; Held: 2nd Cir. Affirmed denial of Preliminary Injunction; to trial.**
- Note: Book Publishing Industry Practices as to © & Contracts, Very Different from Music Publishing and Music Recording Industry Business Practices & Contracts!

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[1] Jerry Greenberg v. National Geographic Society, (U.S.C.A. 11th Cir March 22, 2001) No. 00-10510.
[2] New York Times Co., Inc. v. Tasini (June 25, 2001), 121 S.Ct. 2381 U.S. 483, 150 L.Ed.2d 500
[3] Random House, Inc. v. Rosetta Books LLC (U.S.C.A. 2nd Cir. Mar. 8, 2002) 150 F. Supp. 2d 613

Music Recording Industry Leading the Way

- Sound recording industry, shrinking-international mergers- only 5 or so “major” record labels” (RIAA), grown as strong or stronger than the music publishing industry and is leading the way with new laws and business models:
  - **Anti-trust issues (own online monopoly?)**
  - **Copyright ownership issues (WMFH, k, statutes),**
  - **Fair use issues (as reviewed in Napster),**
  - **Digital Copy Protection issues (Uni/Eminem CD),**
  - **Internet, and new, Intl. P2P (Kaaza) issues**
- Requires understanding & development of entertainment industry law/business models.

New and Newer e-Media

Challenges to Copyright Owners to Keep us with Licensing New Technology

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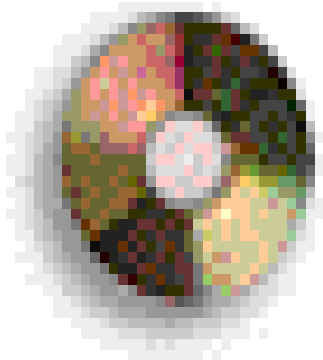
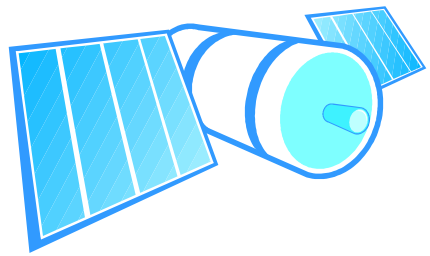


CD / DVD

Chip Technology

Peer-to-Peer & Subscription



Satellite

“Hit Clips”
a story of “Survival” in the Music Business

- It’s a TOY! Tiny electronic chip, plays min. of popular song – mini players-Destiny’s Child singing their hit “Survivor”
- Made by Hasbro’s Tiger Electronics, world’s largest elec. Toy mftr. – they license content for toys all the time…

But went to Music Ind. to License digital music-hit brick wall w/ threat & uncertainty of Napster & the Internet, the MI refused to license anything “digital”- Hasbro came to Music Lawyer, & w/knowl. of existing business models & relationships, were able to est. new business models to license the recordings, songs, & advertising from various record labels, artists, writers & publishers for Hit Clips-

Now, WSJ, Hit Clips was last years biggest new toy & all the big rec. co’s & artists are lining up to be the next Hit Clip!

AND, so, this story shows that, like the DC song, **©,** & the Entertainment Industry will “SURVIVE” In the Digital Age.

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Thank You!

Beverly Robin Green [1]

Law Offices of Green & Green

www.entertainmentlegal.com

bev@musiclawyer.com

[1] AV rated, Member, IP Section